

UNITED STATES OF AMERICA)	
	)	IN THE COURT OF MILITARY
	)	COMMISSION REVIEW
)	
	)	APPELLANT'S SUPPLEMENTAL
	)	BRIEF IN RESPONSE TO COURT'S
	)	REQUEST AT ORAL ARGUMENT
)	
v.	)	Case No. 07-00000001
)	
)	
	)	Before a Military Commission
OMAR AHMED KHADR	)	Convened by MCCO # 07-02
a/k/a "Akhbar Farhad")	
a/k/a "Akhbar Farnad"	)	Presiding Military Judge
a/k/a "Ahmed Muhammed Khali"	)	Colonel Peter E. Brownback III
)	

**TO THE HONORABLE JUDGES OF THE COURT OF MILITARY
COMMISSION REVIEW**

GOVERNMENT'S SUPPLEMENTAL BRIEF IN RESPONSE TO
THE COURT'S REQUEST AT ORAL ARGUMENT

The Government respectfully submits the following supplemental brief, as requested by the Court at oral argument on August 24, 2007.

I.

As an initial matter, the Government reiterates its position that Khadr's Combatant Status Review Tribunal ("CSRT") determination is sufficient to establish military commission jurisdiction. *See* Supplemental Brief in Support of the Government's Appeal ("Gov. Supp. Br.") at 21-30. At oral argument, the Court noted the differences between the "enemy combatant" determination made by CSRTs and the "unlawful enemy combatant" determination set forth in the Military Commissions Act ("MCA"). Indeed, the Defense placed heavy reliance on that fact as well. *See* Defense Br. at 14-16. But that emphasis misunderstands the Act's prescriptions in the current conflict with al Qaeda and the Taliban. Insofar as the CSRT determined Khadr to be

an “enemy combatant,” the only question is whether—as a matter of law—that determination amounts to a declaration that Khadr was an enemy combatant who belonged to an unlawful force.

As to that issue, there can be no genuine dispute. The CSRT definition of “enemy combatant” exclusively concerns the armed conflict against al Qaeda and the Taliban. And in the MCA, *Congress* directly answered the question as to whether al Qaeda and the Taliban are unlawful forces. The Act provides—in the statutory parenthetical of section 948a(1)(A)(i)—that al Qaeda and the Taliban are unlawful forces.¹ That determination is appropriate because under the Act and under the Geneva Conventions, a determination of lawful status turns entirely on the nature of the force or corps or organization with which the individual is associated. *See* 10 U.S.C. § 948a(2); Geneva Convention Relative to the Treatment of Prisoners of War, art. 4 (Aug. 12, 1949) (“GPW”); Gov. Supp. Br. at 23-24.

Thus, CSRT determinations of “enemy combatant” status resolve the only open question in this conflict—an individual’s association with al Qaeda or the Taliban. Given that scope, a CSRT determination under rules in place from the beginning of the process constitutes a finding that the person is an “*unlawful* enemy combatant.”

The Court pointed to differences in the degree of association with al Qaeda or the Taliban required. None of those differences are at issue in this case, however. The Act makes clear that

¹ The Act provides, in relevant part, that “the term ‘unlawful enemy combatant’ means *a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda or associated forces).*” 10 U.S.C. § 948a(1)(i) (emphases added). At oral argument, it was suggested that the parenthetical might be read as requiring both proof that the person had engaged in hostilities and was part of al Qaeda. Such an interpretation, however, would render the statutory parenthetical mere surplusage, contrary to the canon requiring courts to give meaning to every word of a statute. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”) (internal quotation marks and citation omitted). The only plausible reading of the statute is that Congress sought to make clear that the general definition of “unlawful enemy combatant” includes a person who is part of the unlawful forces against which the United States is now engaged in armed conflict.

a person who is “part of the Taliban [or] al Qaeda” is—without more—an “unlawful enemy combatant.” 10 U.S.C. § 948a(1)(A)(i). The CSRT so held with regard to Khadr, specifically finding that he was an “al Qaeda fighter,” as well as that he trained at al Qaeda camps and carried out al Qaeda military operations. Whatever differences there may be in cases relying on acts of support rather than membership are not presented in this case.

In any event, Congress countenanced such minor differences in the degree of association in order to move the military commission process forward with dispatch. *See* Gov. Supp. Br. at 6-8. Thus, Congress embraced CSRT determinations of association with al Qaeda or the Taliban made “before” the enactment of the MCA to establish military commission jurisdiction. 10 U.S.C. § 948a(1)(A)(ii). And given the context of the current conflict, where the enemy forces had already been determined by the President and Congress to be (and clearly were) “unlawful,” it makes perfect sense that Congress titled those determinations as “unlawful enemy combatants.” After all, notwithstanding every invitation to do so, not even the Defense has credibly asserted that al Qaeda—an organization dedicated to terrorizing civilians—is a force that bears its arms openly, is under responsible command, wears uniforms with a distinctive insignia, and systematically follows the laws of war.

2.

At oral argument, the Court also asked whether the President’s February 7, 2002 determination constituted a finding that members of al Qaeda, as well as the Taliban, were unlawful enemy combatants. The answer to the Court’s question is laid out at footnote 8 of the Government’s reply brief. To reiterate, in his 2002 memorandum, the President “accept[ed] the legal conclusion of the Department of Justice” that members of al Qaeda are unlawful enemy combatants, not entitled to prisoner of war protections, “because, *among other reasons*, al Qaeda

is not a High Contracting Party” to the Geneva Conventions. White House Memorandum ¶ 2(a) (Feb. 7, 2002). The Department of Justice’s legal conclusion—incorporated in the President’s determination—makes clear that al Qaeda does not satisfy the four conditions for lawful combatancy under Article 4 of the Third Geneva Convention or section 948a(2) of the MCA:

Even if article 4, however, were considered somehow to be jurisdictional as well as substantive, captured members of al Qaeda still would not receive the protections accorded to POWs. First, al Qaeda is not the “armed forces,” volunteer forces, or militia of a state party that is a party to the conflict, as defined in article 4(A)(1). Second, they cannot qualify as volunteer force, militia, or organized resistance force under article 4(A)(2). That article requires that militia or volunteers fulfill four conditions: command by responsible individuals, wearing insignia, carrying arms openly, and obeying the laws of war. Al Qaeda members have clearly demonstrated that they will not follow these basic requirements of lawful warfare. They have attacked purely civilian targets of no military value; they refused to wear uniform or insignia or carry arms openly, but instead hijacked civilian airliners, took hostages, and killed them; and they themselves do not obey the laws of war concerning the protection of the lives of civilians or the means of legitimate combat. As these requirements also apply to any regular armed force under other treaties governing the laws of armed conflict, al Qaeda members would not qualify under article 4(A)(3) either, which provides POW status to captured individuals who are members of a “regular armed force” that professes allegiance to a government or authority not recognized by the detaining power.

See Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees*, at 10 (Jan. 22, 2002) (footnote omitted). The Defense and the trial court were wrong to characterize the President’s determination as falling short of a finding that al Qaeda is an unlawful force and that members of al Qaeda are unlawful enemy combatants. See Defense Br. at 18 n.21.² Moreover, the President eliminated any doubt on this score when he “reaffirm[ed]”

² Also importantly, there is no space between the Act’s definition of “lawful enemy combatant” and the requirements for prisoner-of-war status in the Third Geneva Convention. Accordingly, the Defense’s argument rests on a false premise. For example, the Act does not waive requirements for the force to be associated with a State “Party,” that is a High Contracting Party to the Geneva Conventions. Compare GPW art. 4 (using the term “Party”

his determination “that members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war.” Executive Order 13440, § 1(a), 72 Fed. Reg. 40707, 40707 (July 24, 2007).

3.

Third, the Court asked whether Khadr had the appropriate incentives to contest the Government’s allegations before the CSRT, because he did not know that Congress would use that determination to establish military commission jurisdiction. Before the date of Khadr’s CSRT, however, the President had established military commissions to prosecute captured members of al Qaeda who had committed war crimes. *See* Presidential Military Order, *The Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57833 (Nov. 16, 2001). Thus, it is wrong to say that at the time of the CSRT, Khadr could not have known that the fact of his membership in al Qaeda might expose him to prosecution by military commission. To the contrary, at the time of the CSRT, Khadr knew (or should have known) that the prospect of a future prosecution was quite real.

Moreover, whatever Khadr’s incentives may have been before the MCA’s enactment, Congress balanced those policy considerations when it provided that CSRT determinations made “before” the MCA’s enactment conclusively established military commission jurisdiction. 10 U.S.C. §§ 948a(1)(A)(ii), 949d(c). Congress could reasonably have determined that a CSRT determination that an individual was a member of al Qaeda was a sufficient basis for concluding that the detainee should be tried by a military commission, rather than a court-martial (if a lawful enemy combatant) or a federal criminal proceeding (if a civilian). Congress affirmatively

for “High Contracting Party”), *with* 10 U.S.C. § 948a(2) (using the term “State party”). The President’s determination that members of al Qaeda are not entitled to prisoner-of-war protections, *a fortiori*, means that they are not “lawful enemy combatants” under the Act.

determined that a CSRT determination rendered “before” the MCA’s enactment would suffice for jurisdiction, and that should be the end of the matter.

Finally, wholly apart from the question of prosecution, Khadr was well aware that the CSRT determination would have quite a significant impact upon his liberty. The Department of Defense informed detainees that the outcome of CSRT proceedings would affect whether they would continue to be detained. *See* Memorandum for the Secretary of the Navy, from Paul Wolfowitz, Deputy Secretary of Defense, *Re: Order Establishing Combatant Status Review Tribunal*, at 2 (July 7, 2004). The fact that Khadr’s liberty was at stake in the CSRT proceeding would appear to be at least as significant as the type of forum in which he might be tried for war crimes. It is thus incorrect as a matter of fact, and irrelevant as a matter of law, to conclude that Khadr lacked fair notice that the stakes of his CSRT were weighty. Khadr clearly had a strong incentive to participate in the CSRT, and therefore, Congress appropriately may have relied upon that tribunal’s determination in establishing the basis for military commission jurisdiction.

4.

Finally, we return to the Government’s first argument, that the trial court erred by holding that it was legally barred from directly determining unlawful enemy combatant status, and therefore its own jurisdiction. The Court asked whether section 948d(c)—providing that a CSRT’s finding “that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission”—constitutes a statutory bar to the military judge directly determining “unlawful enemy combatant” status.

To the contrary, the purpose of section 948d(c) is to establish a safe harbor for military commission jurisdiction, complementing the second option for establishing jurisdiction under section 948a(1)(A). *See* Gov. Supp. Br. at 12. This provision was needed to make clear that the

military judge could not revisit a CSRT's finding of "unlawful enemy combatant" status, *when there is such a finding*. But nothing in section 948d(c) *requires* such a finding to support military commission jurisdiction. And this structure, again, is crucial, as Congress understood that there will not always be CSRTs and did not intend to require them. *See* Gov. Supp. Br. at 13. Therefore section 948a(1)(A) permits the military judge to establish jurisdiction in two independently sufficient ways—either by applying the definition in subparagraph (i) *or* by noting the "dispositive" CSRT determination under subparagraph (ii). What the statute does *not* permit is the conjoined legal holding of the trial court—that there has not been a finding of "unlawful enemy combatant" status by the CSRT and that the military judge is barred, due to the "dispositive" nature of a finding that has not been made, from determining such status directly.

//s//

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A handwritten signature in black ink, appearing to read 'Keith A. Petty', with a long horizontal stroke extending to the right.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to Lieutenant Commander Kuebler on the 31st day of August 2007.

A handwritten signature in black ink, appearing to read 'KAP', with a long horizontal stroke extending to the right.

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